

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

LINDA HENNING,

Petitioner,

vs.

No. CIV 08-328 RB/LFG

ALLEN COOPER, Warden, and the
ATTORNEY GENERAL OF THE
STATE OF NEW MEXICO,

Respondents.

**ORDER GRANTING IN PART AND DENYING IN PART
PETITIONER'S MOTION TO COMPEL, REQUEST FOR
CONTINUANCE AND RETURN OF DOCUMENTS**

THIS MATTER comes before the Court on a motion filed September 21, 2009 by Petitioner Linda Henning ("Henning") entitled "Motion to Compel Production of Docs # 34, 35, 36 and Request for Continuance and Return of General Objection and Supplemental Documentation to Expand Court Record filed on Sept. 15, 2009 (Addendum)" [Doc. 40]. No response is necessary. For the reasons given below, the motion is granted in part and denied in part.

On August 25, 2009, Henning filed Objections to the Magistrate Judge's Findings and Recommended Disposition in this case. The Court conducted a *de novo* review and on September 4, 2009, entered an Order Adopting Magistrate Judge's Findings of Fact and Recommended Disposition and Dismissing Case With Prejudice [Doc. 34]. A Judgment [Doc. 35] in favor of Respondents was entered on that date.

Meanwhile, Henning wrote a letter to the Clerk of Court dated August 28, 2009, in which she requested that the Clerk send her a Notice of Appeal form and a Docketing Statement form for the Tenth Circuit. This letter was received in the Clerk's office on August 31, 2009. On September 15, 2009, the Clerk entered the letter on the docket as a Notice of Appeal, listing a filing date of

August 31, 2009. [Doc. 36]. Also on September 15, the Clerk of the District Court transmitted the preliminary record on appeal to the United States Court of Appeals for the Tenth Circuit, noting that the docket and appeal fee had not yet been paid and that a motion for leave to proceed on appeal without prepayment of costs or fees was mailed to Henning. [Doc. 37].

In a letter dated September 18, 2009, the Clerk of the Court of Appeals wrote to Henning, notifying her that her appeal had been docketed and that if she intended to appear *pro se* in the appeal, she must enter her appearance within 30 days from the date of the letter. She was also advised that she must pay the docket fee and filing fee, or submit an application for leave to proceed without prepayment of fees to the District Court. [Doc. 39].

Henning now files this Motion, stating that she never received copies of Document Nos. 34, 35 or 36, *i.e.*, the Order Adopting, the Judgment, and the Notice of Appeal. She also asks that a “continuance be granted in order to review such documents and respond with a reconsideration guaranteed by the First Amendment to the U.S. Constitution . . .” [Doc. 40, at 1]. She states further that at no point did she request that this Court file a Notice of Appeal; rather, she sent a letter asking only that forms be sent. She adds that “this Court has created such undue burdens and has by these inactions ‘raised the bar’ for this Petitioner to meet critical deadlines in her appeal process.” [*Id.*, at 1-2].

The Court’s Notice of Electronic Filing for the documents in question includes certification that all three documents were mailed to Henning at her current address of record. Henning states that she did not receive copies of these documents, and the Court can only conclude that either the United States Postal Service or the prison mail officials made an error or failed to do their job in transmitting these documents to Henning. Therefore, the Court will order that the three documents be sent to Henning again, by certified mail. In addition, Henning asks that the Court “return” a document she filed on September 17, 2009 titled “Addendum Citing General Objection and Supplemental Documentation” [Doc. 38]. It appears that Henning wants the Court to mail this document back to her. The Court will order that a copy of Doc. 38 also be sent to Henning by

certified mail.

Henning states further that she did not intend by her August 28 letter to file a Notice of Appeal. She asks for a “continuance” with respect to the time for filing a Notice of Appeal, indicating that she may wish to “respond with a reconsideration.” [Doc. 40, at 1]. While there is no provision for a “motion for reconsideration” under the Federal Rules, there is provision for a motion to alter or amend the judgment under FED. R. CIV. P. Rule 59(e), or for relief under FED. R. CIV. P. Rule 60(b).

The Court interprets Henning’s request for a continuance to be a motion for extension of time to file a Notice of Appeal under FED. R. APP. P. 4(a)(5). This Court cannot grant that request, since an appeal of this case has been docketed with the Court of Appeals for the Tenth Circuit. This Court cannot assert jurisdiction simultaneously with the Court of Appeals. While it is apparent that Henning did not intend to file a Notice of Appeal, the fact that her letter was treated as such by the Clerk, and the appeal was accepted and docketed by the Court of Appeals, divests this Court of jurisdiction over those aspects of the case involved in the appeal. Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982); Walker v. City of Orem, 451 F.3d 1139, 1146 (10th Cir. 2006). Henning must direct any requests regarding her appeal to the United States Court of Appeals for the Tenth Circuit, Cause No. 09-2224.

The District Court does retain jurisdiction after an appeal has been taken to decide tangential matters collateral to the appeal. Stewart v. Donges, 915 F.2d 572, 575 & n.3 (10th Cir. 1990). The Court will therefore grant Henning’s request that the Court mail her copies of Document Nos. 34, 35, 36 and 38.

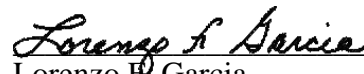
Order

IT IS THEREFORE ORDERED that the Petitioner’s “Motion to Compel Production of Doc.s # 34, 35, 36 and Request for Continuance and Return of General Objection and Supplemental Documentation to Expand Court Record filed on Sept. 15, 2009 (Addendum)” [Doc. 40] is granted in part and denied in part.

IT IS FURTHER ORDERED that the Clerk will send copies of Document Nos. 34, 35, 36, and 38 to Petitioner by certified mail.

IT IS FURTHER ORDERED that Petitioner's request to extend time for filing a Notice of Appeal is denied for lack of jurisdiction.

IT IS FURTHER ORDERED that the Clerk is directed to send a copy of this Order to the United States Court of Appeals for the Tenth Circuit, referenced to appellate Cause No. 09-2224.



Lorenzo F. Garcia
Chief United States Magistrate Judge